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ABSTRACT

Confidentiality, long a concern, has become, with the increase in counseling and therefore personal data of even greater concern to counselors. Most of the time, counselors accept this responsibility without guide lines for release of information, either by the local district or by the state in which they work. Counselors are seeking assurances that they will not be sued because of the nature of their profession in handling records, information about students, and the release of this information. Action has been taken by some states, Michigan and Iowa on the release of this information. Privileged communication may not be what counselors need, since this protects the counselee not the counselor, and furthermore, information could not then be used to benefit the counselee. Each state should construct guide lines to give assistance in understanding and protection of the confidential information given to the schools and used by school personnel including counselors. The second article compiles some of the Kansas laws, legal opinions, and position papers that give insight into the problems and the position of the Kansas counselor as it relates to the problem of confidentiality. (SJ)

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Confidentiality and The School Counselor

by
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Presented at A.P.G.A. Meeting
State Supervisors Section
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&

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&
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Introduction

Confidentiality in the work of the school counselor has been a topic that has generated much concern, many surveys, and a huge quantity of dialogue around the country. It seems that many groups of people involved in education have a need to know more about what is being done in this area.

Two years ago, the State Supervisor's Section of A.C.E.S. utilized the "task force" approach to serious problems that were of concern in areas of Guidance and Counseling. One of those concerns was the topic now being discussed. The task force wanted to know what has been done, what should be done, and what could be done in this area. Out of the discussion and exchange of ideas in our "task force" group came the assignment for this paper.

The more I worked at the assignment, the more unqualified I felt I was for the responsibility I had undertaken. I also saw the need for more information, and was challenged to make this report. I became more aware of the need as I filled out questionnaires from other states as these questionnaires attempted to find out what is being done. The search by Wisconsin is one of the latest.

When I started looking at the area of confidentiality, I realized the legal complications that are involved in understanding and working in this area. The differences that exist in laws between the states prohibit any flat hard statement that would cover confidentiality for all states. Each state has different concepts and a variety of laws

and varied interpretations of those laws. The precedents established by one law suit or court case may be upheld in one state and ignored in another. Illegal practices may exist and until challenged by a test case may continue for many years.

The practices of laws concerning confidentiality in the various states has created a moras that defies order of being put into logical categories. Confusion exists and misunderstandings develop, both through lack of background in the law and understanding of what confidentiality really is. There are terms to be understood, and vocabulary to be developed, before most of us can discuss confidentiality and related areas.

With all the concerns we have, very little literature was available concerning this topic until recently. Hardly anything has been written as guide lines for the local district and the counselors working in the local district. This I believe is due to the confusion that exists over the land, and the absence of court cases in quantity to force legislation.

A few of the available articles in the area of confidentiality are:

HUCKINS, WESLEY. Ethical and Legal Consideration in Guidance, Guidance Monograph series, series I: Organization and Administration, Boston, Houghton Mifflin Company, 1968.

KILLIAN JOHN D. The Law, the Counselor, and Student Records, Washington, The Personnel and Guidance Journal, February 1970, Vol. 48 No. 6.

LITWACK LAWRENCE., ROCHESTER DEAN., OATES RALPH., ADDISON WAYNE., Testimonial Privileged Communication and The School Counselor, Washington, The School Counselor, Vol. 17, No. 2, November 1969.

ETHICAL STANDARDS.; Section B, American Personnel and Guidance Association, Washington, 1961.

PUPIL ACCOUNTING FOR IOWA SCHOOLS-April 18, 1962 (5, 1962)-Page 13, Accounting Manual.

State Laws

(WEST'S ANNOTATED CALIFORNIA CODES, EDUCATION CODE, sec. 10751-10752).

(NEW JERSEY STATUTES ANNOTATED, sec. 18:2-4.1).

(MONTANA REVISED CODES ANNOTATED, sec. 93-701-93-704).

*(MICHIGAN STATUTES ANNOTATED, sec. 27A·2165).

*(INDIANA, H. 1309 Chapter 299, sec. 2).

Confidentiality

The counseling profession has grown rapidly the last ten years. The emphasis of Title V(a), the addition of staff members to State Departments of Education, and the establishment of new counselor education departments in many Universities have testified to this growth. There has also been a corresponding growth in the use of, confidence in, and dependence upon the services of the counselor. By the nature of the relationship between counselor and counselee much information, verbal and written, accumulated about the individual. The professional concern about the individual counselor and the information handled brought about the Ethical Standards of the A.P.G.A. As counselors in the field gained rapport and acceptance, the records and files of information began to grow. With this accumulation of personal data the counselors began to be concerned with ethical consideration, helpful processes for the counselee, and concern for society. Many counselors are running scared because the custodial responsibility of this personal information puts a great load of responsibility upon their heads. Most of the time this responsibility is accepted without guide lines for release of information, either by the local district or by the state in which they work. For many years we in the guidance movement have, like the proverbial bird, stuck our heads in the sand concerning legal responsibility, saying, "It won't happen to us". This attitude is really, "For the birds". Another attitude has been as one of our presidents said, "If you can't stand the heat get out of the kitchen". This attitude is not realistic

either. Any one can be taken to court. It is costly to pay lawyer fees to prove our innocence of defamation, invasion of privacy, or other legal implications associated with information and working with people. The areas of concern are basically pupil records, interviews, testing information, and with the advent of computers, the whole bank of information which can be stored, recalled, and printed in a very short time. The variety of information that we record and store is in demand by many people. We have requests to release this information to parents, to prospective employers, college admission people, colleagues in education, practicum students, researchers, and members of the healing arts to mention a few. The possibility of defamation or invasion of privacy being claimed is with us in many of these requests.

The myth that schools and teachers could not be sued began to errode as court decisions began to go against school districts and individual employees of school districts. Counselors are seeking assurances that they will not be sued because of the nature of their profession in handling records, information about students, and the release of this information. Invasion of privacy, defamation, or violation of ethical confidentiality are,some of the fears always present with the school counselor. To this date there have been few court cases to establish precedents for liability or protection of counselors. Many states have made attempts at having laws passed for this purpose but most have failed.

Most counselors are pretty naive in areas of the law. Until we are on the witness stand we can't understnad the workings, vocabulary, constrictions, and confusion that exist in the legal process.

We are humanistic and think that common sense, sincerity, empathy and a desire to help our counselee are the only things that should be considered. We hold on to these things like a security blanket and hope they will protect us from the world of censure and legal responsibility. We find this security blanket may make us feel good, but when legal actions are taken, they are of little value in the process of law.

Some consolation may be taken, in that courts have been sympathetic and reasonable in their attitude toward professional school people in the expression of their duties. John D. Killion in his article "The Law, The Counselor, and Students Records states, " The Counselor has little to fear from legal action, provided that he performs in a professional and ethical manner and follows certain basic principles".

Other lawyers and judges that I have talked with also express this opinion. These certain "Basic Principles" need to be spelled out in the forms of guide lines for counselors in order that some degree of security and comfort may be attained in the expression of their work. In the guide lines set forth we would also have included some basic understanding of legal terms and areas of responsibility under the law. We tend to fear those things we don't understand. With understanding, confusion and despair is replaced with order and stability for counselor and students alike.

The action that has been taken by various states falls into, (1) rules for release of information from pupil records with Michigan and Iowa being good examples of this. The rules for release by Iowa are: Persons to whom <u>appropriate</u> pupil information may be <u>given</u> include:

1. The parent or guardian of the pupil.
2. A person designated in writing by the pupil's parent or guardian.
3. Personnel employed by a public, private, or parochial educational

institution where the pupil attends, has attended, or intends to enroll.
4. An officer or employee of the United States, the State of Iowa, of a city and/or county seeking information in the course of his duties.
5. A medical doctor, or personnel employed by a public or private guidance or welfare agency of which the pupil is a client.
6. An employer or potential employer of the pupil.

The rules for release by Michigan are:

"No teacher, guidance officer, school executive or other professional person engaged in character building in the public schools or in any other educational institution including any clerical worker of such schools and institutions, who maintains records of students' behavior or who has such records in his custody, or who receives in confidence communications from students or other juveniles, shall be allowed in any proceedings, civil or criminal, in any court of this state, to disclose any information obtained by him from such records or such communications, not to produce such records or transcript thereof, except that any such testimony may be given, with the consent of the person so confiding or to whom such records relate, if such person so confiding or to whom such records relate is 21 years of age or over, if such person is a minor, with the consent of his or her parent or legal guardian."

(2) Rules for certain groups such as Montana for Psychology teachers.

(3) Privilege communications with Indiana being the prime example for this. Other states have various degrees of legislative direction, such as New Jersey, and California.

PRIVILEGED COMMUNICATION. In the law of evidence. A communication made to a counsel, solicitor, or attorney, in professional confidence, and which he is not permitted to divulge; otherwise called a "confidential communication."

There has been a cry for privileged information for the counselor. I am not sure that this is what we really want.

As you look at the legal definition of "Privileged Communication" it would seem that this term is for the protection of the counselee not for the protection of the counselor. If "Privileged Communication" is granted it would seem to me that information gained could not be used for the benefit of the counselee. Group work would be limited, work with teacher would be halted, or hampered, and information could not be used in referral for the benefit of the counselee. This feeling is borne out by the extensive work done in Florida as they dug into this problem and as I last heard had decided not to press for privileged communication for counselors.

The position of the K.P.G.A. Committee was stated in three statements:

1. Counselors are not professionally ready for such a law. It is questionable whether the professional conduct of counselors with regard to respecting confidence is at a uniformly high enough level to prevent a significant minority of the profession from getting into legal trouble.
2. Such a law might limit or restrict the work of counselors from the standpoint of referrals, staff conferences, and information released to parents and school staff.
3. The need for having privileged communications by counselors is present but court cases dealing with counselors being forced to reveal confidential information in court seldom happens.

A release for the use of information gained would have to be obtained for each person that you work with. The problem of legal release comes up with legal age of a child, parents, guardians, split marriages, wards of courts and many other implications that would require a staff of lawyers just for determing who could sign a release.

The Indiana law has been critized, specifically by Beymor (1966), in that the act could not be consistently interpreted, also as to who the school system would designate as a counselor. It would be interesting to hear from Indiana as to how this act is working and how they are using privileged information within the system, when disclosures of information gained by the counselor is protected.

I can see little advantage or practicality for counselors in the granting of Privileged Communication.

I would rather see legislation enacted to strengthen the guide lines on Confidentiality in Section B of A.P.G.A.'s ethical standards. "The counseling relationship and information resulting there from must be kept confidential consistant with obligations of the member as a professional person."

The growth and stregthening of our profession and professional use of information would be the corner stone for guide lines for protection of the schools and school counselors. The law of Michigan, and the guide lines in Iowa for release of information would be a stepping stone for involvement in this process.

I have not attempted to outline all of the backgrounds as far as court cases are concerned. I have not tried to summarize the implications of the various laws now in existence upon the law books around our country. I have listed in the supplement of this paper a vocabulary of legal terms that was necessary for me to understand as I began to read the literature. I have also summarized a list of court judgments and interpretations in understanding some of these terms.

Recommendation

I would like to recommend that each state construct a guide line, monograph, handbook, or whatever title that is desired, to give assistance

in understanding and protection of the Confidential information given to the schools and used by school personnel including counselors. This aid would have to be made after a review of the laws of each state. The definition of public records, court cases, review of codes of ethics by professional groups, and any other criteria that could be used. I would suggest a small committee with legal assistance, State Department officials and people from the Ed. Community.

The guide lines would determine what were public records, what goes in. them, what and when information comes out of them and if interpretation is needed. I should recommend that this subject be assigned for task force consideration to gather collective ideas and criteria for the establishment of guide lines for each state to develop their own.

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2. Van Allen vs. McCleary, 211 N.Y.S. 2d 501 (New York, 1961).
3. Johnson vs. Board of Education of City of New York, 220 N.Y.S. 2d 363 (New York 1961).
4. Valentine vs. Independent School District, 183 N.S. 434 (Iowa, 1921).

DEFAMATION

1. Iverson vs. Frandsen 237 F. (2d) 898 (Utah, 1956) (CAIO).
2. Kenny vs. Gurby, 95 So. 34, (Alabama, 1923).
3. Basket vs. Crossfield, 228 S.W. 673 (Kentucky, 1920).

STUDENT RECORDS

1. (West's Annotated California Codes, Education Code, sec. 10751-10752).
2. (New Jersey Statutes Annotated, sec. 18:2-4.1).
3. (Montana Revised Codes Annotated, sec. 93-701-93-704).
4. (Michigan Statutes Annotated, sec. 27A·2165).
5. Indiana (H·1309 March 11, 1965, sec. 2).
6. Kansas G.S. 1961 Supp., 45-201 to 203.
7. Louisiana (Wagner vs. Redmond, 1960).
8. Wisconsin (Bogurt vs. Iverson), 1960.

RIGHT OF PRIVACY

1. (Pavesick vs. New England Life Insurance Co. 122 Ga. 190, 505. E. 68).
2. (Roberson vs. Rochester Folding Box Co.) Wis. 1956.

RIGHT TO LEGAL COUNSEL

1. Madera vs. Board of Education of City of New York 386 F 2d 775 (1967).

Definition of Terms

The following definitions of terms were obtained from "Black Law Dictionary," Fourth Edition, West Publishing Company.

CONFIDENTIAL COMMUNICATIONS. These are certain classes of communications, passing between persons who stand in a confidential or fiduciary relation to each other, (or who, on account of their relative situation, are under a special duty of secrecy and fidelity,) which the law will not permit to be divulged, or allow them to be inquired into in a court of justice, for the sake of public policy and the good order of society. Examples of such privileged relations are those of husband and wife and attorney and client.

PRIVILEGED COMMUNICATIONS. In the law of evidence. A communication made to a counsel, solicitor, or attorney, in professional confidence, and which he is not permitted to divulge; otherwise called a "confidential communication."

IN THE LAW OF LIBEL AND SLANDER. A defamatory statement made to another in pursuance of a duty, political, judicial, social, or personal, so that an action for libel or slander will not lie, though the statement be false, unless in the last two cases actual malice be proved in addition.

When a communication is fairly made by one in the discharge of a public or private duty, legal, moral, or social, of perfect or imperfect obligation, or in the conduct of his own affairs, to one who has a corresponding interest to receive such communication, it is "privileged," if made in good faith and without actual malice. A "privileged communication" is one made in good faith, up any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty, and which contains matter which, without the occasion upon which it is made, would be defamatory and actionable. In a "privileged communication" the words used, if defamatory and libelous, are excused, while in "fair comment" the words are

not a defamation of plaintiff and not libelous.

PRIVILEGED COMMUNICATIONS are either (1) absolutely privileged, or (2) conditionally or qualifiedly privileged. An "absolutlely privileged communication" is one made in the interest of the public service or the due administration of justice, and is practically limited to legislative and judicial proceedings and other actions of state. By an "absolutely privileged" publication is not to be understood a publication for which the publisher is in no wise responsible, but it means a publication in respect of which, by reason of the occasion upon which it is made, no remedy can be had in a civil action for slander or libel, even though the words are published mailciously and with knowledge of their falsity. A "qualifiedly privileged communication" is a slanderous statement uttered in good faith upon a proper occasion and from a proper motive based upon an honest belief that it is true, but, unlike communication wholly privileged, the defendant has the burden of proving want of malice or ill will. A communication "qualifiedly privileged" is one which is prima facie privileged only, and in which the privilege may be lost by proof of malice in the publication. A communication made in good faith upon any subject-matter in which the party communicating has an interest or in reference to which he has a duty, either legal, moral, or social, of made to a person having a corresponding interest or duty, is "qualifiedly privileged."

CRIMINAL LIBEL. A libel which is punishable criminally; one which tends to excite a breach of the peace. The malicious defamation of a person made public by any printing or writing tending to provoke him to wrath and to deprive him of the benefits of public confidence and social intercourse.

INTRUSION. A species of injury by ouster or amotion of possession from the freehold, being an entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion.

LIABLE. Bound or obliged in law or equity; responsible; chargeable; answerable;

compellable to make satisfaction, compensation, or restitution.

LIBEL. In torts. A method of defamation expressed by print, writing, pictures, or signs. In its most general sense any publication that is injurious to the reputation of another. Defamatory words read aloud by speaker from written article and broadcast by radio constitute libel.

Accusation in writing or printing against the character of a person which affects his reputation, in that it tends to hold him up to ridicule, contempt, shame, disgrace, or obloquy, to degrade him in the estimation of the community, to induce an evil opinion of him in the minds of right-thinking persons, to make him an object of reproach, to diminish his respectability or abridge his comforts, to change his position in society for the worse, to dishonor or discredit him in the estimation of the public, of his friends and acquaintances, or to deprive him of friendly intercourse in society, or cause him to be shunned or avioded, or where it is charged that one has violated his public duty as a public officer.

Almost any language which upon its face has a natural tendency to injure a man's reputation, either generally or with respect to his occupation.

Censorious or ridiculing writing, picture, or sign made with a mischievous intent.

False accusation which dishonors or discredits a man in estimate of public or his friends and acquaintances or has a reasonable tendency to do so.

LIBELOUS PER QUOD. Expressions "libelous per quod" are such as require that their injurious character or effect be established by allegation and proof. They are those expressions which are not actionable upon their face, but which become so by reason of the peculiar situation or occasion upon which the words are written.

LIBELOUS PER SE. A publication is lieblous per se when the words are of such a character that an action may be brought upon them without the necessity of showing any special damage, the imputation being such that the law will presuee that any one so slandered must have suffered damage.

MALPRACTICE. Any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct.

MANDAMUS. Lat. We command. This is the name of a writ (formerly a high prerogative writ) which issues from a court of superior jurisdiction, and is directed to a private or municipal corporation, or any of its officers, or to an executive, administrative or judicial officer, or to an inferior court, commanding the performance of a particular act therin specified, and belonging to his or their public, official, or ministerial duty, or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived.

PRIVACY RIGHT OF. The right to be let alone, the right of a person to be free from unwarranted publicity. The right of an individual (or corporation) to with-hold himself and his property from public scrutiny, if he so chosses. It is said to exist only so far as its assertion is consistent with law or public policy, and in a proper case equity will interfere, if there is no remedy at law, to prevent an injury threatened by the invasion of, or infringement upon, this right from motives of curiosity, gain, or malice.

PRIVILEGE. A particular and peculiar benefit or advantage enjoyed by a person, company, or class beyond the common advantages of other citizens. An exceptional or extraordinary power or exemption. A right, power, franchise, or immunity held by a person or class, aganist or beyond the course of the law.

LAW OF LIBEL AND SLANDER.

An exemption from liability for the speaking or publishing of defamatory words concerning another, based on the fact that the statement was made in the performance of a duty, political, judicial, social, or personal. Privilege is either absolute or conditional. The former protects the speaker or publisher without reference to his motives or the truth or falsity of the statement. This may be claimed in respect, for instance, to statements made in legislative debates, in reports of military officers to their superiors in the line of their duty, and statements made by judges, witnesses, and jurors in trials in court. Conditional privilege (called also "qualified privilege) will protect the speaker or publisher unless actual malice and knowledge of the falsity of the statement is shown. This may be claimed where the communication related to a matter of public interest, or where it was necessary to protect one's private interest and was made to a person having an interest in the same matter.

"Absolute privilege" is confined to cases in which the public service or the administration of justice requires complete immunity from being called to account for language used. It is based upon the theory that the publication of defamatory matter must be protected in the interest of and for the necessities of society, even though it be both false and malicious.

"Qualified privilege" extends to all communications made in good faith upon any subject-matter in which the party communicating has an interest or inteference to which he has a duty to a person having a corresponding interest or duty, although the duty be not a legal one, but of a moral or social character of imperfect obligation; and it arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty.

SLANDER. The speaking of base and defamatory words tending to prejudice another in his reputation, office, trade, business, or means of livelihood. Oral defamation; the speaking of false and malicious words concerning another whereby injury results to his reputation.

"Libel" and "slander" are both methods of defamation; the former being expressed by print, writing, pictures, or signs; the latter by oral expressions.

SUBPOENA. (Lat. Sub, under, poena, penalty). A process to cause a witness to appear and give testimony, commanding him to lay aside all pretenses and excuses, and appear before a court of magistrate therein named at a time therein mentioned to testify for the party named under a penalty therein mentioned.

SUBPOENA AD TESTIFICANCUM. Lat. Subpoena to testify. A technical and descriptive term for the ordinary subpoena.

SUBPOENA DUCES TECUM. A process by which the court, at the instances of a suitor, commands a witness who has in his possession or control some documnet or paper that is pertinent to the issues of a pending controversy, to produce it at the trial.

TORT.(from Lat. torquere, to twist, tortus, twisted, wrested aside). A private or civil wrong or injury.

PERSONAL TORT. One involving or consisting in an injury to the person or to the reputation of feelings, as distinguished from an injury or damage to real or personal property, called a "property tort."

QUASI TORT. Though not a recognized term of English law, may be conveniently used in those cases where a man who has not committed a tort is liable as if he had. Thus, a master is liable for wrongful acts done by his servant in the course of his employment.

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"Comments on Inspection of Public School Records and Counselor Privileged Communications"

Compiled by the

GUIDANCE SECTION
State Department of Public Instruction
120 East Tenth Street
Topeka, Kansas

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
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PREFACE

It has long been the concern of many Kansas school counselors that the subject matter of many records and counseling interviews are of a confidential nature and yet they may be forced to disclose, in court, matters which were communicated in confidence by a counselee.

To this concern we have compiled in one source for your review, some of the Kansas laws, legal opinions, and position papers that may give insight into the problems and the position of the Kansas Counselor as it relates to this topic.

Do you, as a counselor of Kansas, wish to exert professional leadership and work in gaining appropriate legislation concerning records and privileged communications?

Please forward your professional concerns and responses to this problem to the Guidance Section. A file will be kept and made available to any professional organization working with this problem.

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IT'S TIME TO RE-EXAMINE CONFIDENTIALITY OF PUPIL RECORDS

by
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In the last decade, two seemingly unrelated phenomena have been at work to cause a re-evaluation of the ethical basis of confidentiality. The continued activity of the Supreme Court in the area of personal rights and privacy stands in juxtaposition to the ever-expanding use of digital computers in the gathering, storing and retrieving of information about the population.

Computers have made significant inroads into the educational market. Today, because of their ability to quickly store, manipulate, and transform large quantities of information, computers can be found in all state departments and most metropolitan school districts. Perhaps the most frequent application of computer technology and data processing techniques has been in the area of pupil accounting and record-keeping.

The ability of computers to furnish information quickly in a variety of formats and combinations should cause a re-examination of the counselor's position in relation to the rights and responsibilities related to the disclosure of confidential pupil information contained in school records. This paper attempts to review the development of the problem of public versus private information and represents an attempt to determine the role of the counselor in this controversy.

HISTORICAL REVIEW

Historically, the problem faced today developed from the system of law in England called "Common Law." As this system has evolved, the public has the right to inspect public records as a protection against secrecy in government. To strike a balance with the inspection right, the privacy of the individual is protected by a series of conditions that must be met by anyone wishing to inspect public records. Specifically, a person must (a) not interfere with the operation of the agency where the records are kept, (b) have a legitimate interest in the record, (c) handle the records with care, and (d) carry out the inspection during reasonable hours at the place where the records are kept.

PUBLIC RECORDS

The school records, commonly called Pupil Permanent Records, in general meet the criteria set for public records and, therefore, fall under the jurisdiction of Common Law. These criteria are:

1. The records are under the care of a public officer. (It is of interest that, legally, teachers and principals are not public officers; they are employees, while superintendents and school board members are public officers.)
2. The records are authorized by law.
3. The records are accurate and durable.
4. The records are written memorials.

When the permanent record information of a pupil is mandated by an official body such as a school board, it meets the criteria of public records.

Incidentally, paper or memoranda in the possession of public officers that are not required by law to be kept by them as official records are not public records and do not require release (Suitz, 1964).

CONFIDENTIALITY AND COMMON LAW

Where does the school counselor stand in relation to confidentiality? Common Law recognizes the relationship between attorney and client, husband and wife, between jurors, and between informer and government as confidential and privileged (Wigmore on Evidence, 1961).

Statute Law, which may be viewed as an extension of Common Law, recognizes certain additional relationships as special and extends the right of disclosure or silence to the physician, with regard to his patient, and the priest, with regard to his penitent. In some states journalists, accountants, and psychologists are also included (Remmlein, 1962).

Interestingly, Common Law provides four conditions that must be met before confidentiality is secure (American Jurisprudence, A. J.). They are:

1. The communication originates with the understanding that it will not be disclosed.
2. Confidentiality must be maintained for continuance of the relationship between the parties.
3. Confidentiality must be fostered with care and perseverance.
4. The harm to the relationships would be greater than the good incurred in the litigation.

School counselors are not included under the mantle of privileged communications and are therefore subject to litigation under the laws of libel and slander when they make information of a defamatory nature available in written or verbal communications (Ware, 1964).

THE ISSUE

The issue revolves around who has the authority to allow for or deny the inspection of what information, by whom, under what circumstances and for what purposes.

Information about pupils ranges from the mundane to the most confidential. The people who would view the records might be eccentrics, interested parents, or impartial professional researchers. The circumstances and purposes are as diversified as the people who, over the years, request pupil information. Fortunately, the law does provide guidelines for the administration of pupil information (Gauerke, 1959).

PROPOSED SOLUTION

Most of the misunderstanding related to pupil information is related not to the giving of information, but to the right of a counselor to withhold information (Drury, 1958). If conditions in a school system are such that a counselor is unclear as to his position, it is here urged that he ask the school board to draw up a clear policy that incorporates the ethical uses of pupil records outlined in the policy statement of the American Personnel and Guidance Association.

This statement urges the use of professional judgment before displaying information to parents; that materials which are not to be displayed without interpretation of the originator of the report (clinic, psychologist, physician, etc.) be clearly marked to this effect; that records should clearly differentiate between observations and inferences regarding pupil behavior; and that the school is responsible for the judgment as to which personnel are appropriate and competent to view and interpret the various information contained in a pupil record.

An excellent example of a written policy on confidentiality of pupil records may be found in Pupil Accounting for Iowa Schools, as approved by the State Board of Public Instruction on April 18, 1962 (5, 1962). The provision in question is spelled out on page 13 of the Accounting Manual. The rules governing the confidentiality of pupil records are listed as follows:

Persons to whom appropriate pupil information may be given include:

1. The parent or guardian of the pupil.
2. A person designated in writing by the pupil's parent or guardian.
3. Personnel employed by a public, private, or parochial educational institution where the pupil attends, has attended, or intends to enroll.
4. An officer or employee of the United States, the State of Iowa, or a city and/or county seeking information in the course of his duties.
5. A medical doctor, or personnel employed by a public or private guidance or welfare agency of which the pupil is a client.
6. An employer or potential employer of the pupil.

Notice the use of the words "give appropriate pupil information." The manual goes on to place qualifiers on pupil information that delimit access to pupil information in the following ways: (a) pupil information of a highly personal and confidential nature should not be entered on the Pupil Cumulative Folder; (b) certain personal information of a restricted nature may be placed in the folder as an insert (to be removed at any time); and (c) counselors may be expected to maintain confidential information in separate files.

SUPREME COURT ACTION

The second part of the topic of legal responsibilities, the action of the Supreme Court, merits a rather complete description of the recent New York case concerning the right of a parent to inspect the school records of his child (Van Allen vs. McCleary in Hamilton School Law, 1961).

The circumstances that precipitated the court case appear to have been these: A father was informed by faculty members of his child's school that the child was in need of psychological help. The father went to a physician and, in order to facilitate diagnosis, signed a release for the physician to secure an abstract of the school psychologist's report on his child. The father further requested, in writing, that the school allow him the right to inspect all records in the school's possession concerning his child.

The school board refused and cited its policy of making pupil progress reports available by means of report cards, conferences, and personal interpretations of pupil files.

The father was not satisfied with the position taken by the school and sued, maintaining that the school was refusing his request in order to cover up incompetence on the staff.

In New York State, the Commissioner of Education previously had adopted regulations requiring local schools to maintain records on health and physical education of pupils. Since this directive of a public official met the basic requisites in establishing pupil records, and these certain school records were in fact maintained under the directive of a public official, Common Law was cited in the court ruling on the case.

THE DECISION

The court's opinion in deciding for the father contained two points of interest. First, the court held that the pupil's records in question were not public records in the strictest sense of the word. Second, the court held that since there was no constitutional, legislative, or administrative direction for or against inspection, a parent was entitled to inspect the school records.

The court issued a writ of mandamus[1] directing the commissioner to allow the parent the right of inspection.

This case was viewed with such importance that the New York State Psychological Association and the New York State Teachers Association filed briefs stating the need for safeguards against misinterpretation of records and emphasizing the impact that the decision in favor of the father would have on professional freedom in expressing views in reports. Their appeals were to no avail.

SUMMARY

In summary, a school counselor faced with the concepts of privacy and computerized record-keeping should view pupil records in light of the following questions before taking a stand concerning disclosure of information. Was keeping a record of the item of information authorized by statute or ruling? Does the Statute or Ruling require disclosure? Impose confidentiality? Specify who may see the record?

The answers to the above questions will not, unfortunately, release the counselor from using his professional judgment while considering the merits of each case. It is reassuring to note that there are precedents for divulging information while acting in a professional capacity, precedents that serve to protect a counselor. If in doubt, keep information confidential until parents sign an indemnifying release or present a court order.

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[1]"The extraordinary writ issued under constitutions and regulated by statute when there is no other adequate remedy at law, in equity, or under statute by a court of superior jurisdiction to an inferior tribunal, to a corporation, or to any person commanding the performance of some clear public duty imposed by laws as a statutory extension of such a remedy" (Van Allen vs. McCleary).

KANSAS STATE DEPARTMENT OF PUBLIC INSTRUCTION

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August 15, 1968

Professor Charles R. Dolan
9C. Fones Hall
Department of Guidance and Personnel Services
College of Education
University of Bridgeport
Bridgeport, Connecticut 06602

Dear Professor Dolan:

Your form letter, dated August 6, 1968, directed to our department, has been referred to me for further handling. In substance you inquire whether we have laws extending privileged communication to school counselors when engaged in a counseling interview or the counseling process.

Please be advised that the closest we have come to extending the protection of these privileges is to certified psychologists. K. S. A. 1967 Supp. 74-5323 places a certified psychologist on the same basis as provided by law for those between an attorney and his client. Therefore, it is my interpretation of the law that in order for a school guidance counselor to be granted the sanctuary of privileged communication he must be a certified psychologist.

Mr. Willard Foster, Director, Guidance and Pupil Personnel Section, State Department of Public Instruction for Kansas, has consulted with me on several occasions regarding the same question which you pose, and has shown considerable interest in legislation which would extend privileged communication to our public school counselors. If Connecticut has such laws, perhaps you would favor us with a copy of same.

I am enclosing herewith a copy of our new law (enacted in 1967) concerning the licensing of psychologists and said K.S.A. 1967 Supp. 74-5323. Also, I am enclosing our law covering privileged communication as it extends to lawyer-client relationships, inasmuch as it now applies to certified psychologists.

I trust this answers your inquiry, and, if not, please feel free to write us again regarding it.

Yours very truly,

David W. Kester
Departmental Attorney

DWK:krk:or
Enclosures
cc: Mr. Willard Foster

LAWYER-CLIENT PRIVILEGE

60-426. Lawyer-client privilege. (a) General rule. Subject to K.S.A. 60-437, and except as otherwise provided by subsection (b) of this section communications found by the judge to have been between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (1) if he is the witness to refuse to disclose any such communication, and (2) to prevent his lawyer from disclosing it, and (3) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated by the client, or (iii) as a result of a breach of the lawyer-client relationship. The privilege may be claimed by the client in person or by his lawyer, or if an incapacitated person, by either his guardian or conservator, or if deceased, by his personal representative.

(b) Exceptions. Such privileges shall not extend (1) to a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the commission or planning of a crime or a tort, or (2) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction, or (3) to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer, or (4) to a communication relevant to an issue concerning an attested document of which the lawyer is an attesting witness, or (5) to a communication relevant to a matter of common interest between two or more clients if made by any of them to a lawyer whom they have retained in common when offered in an action between any of such clients.

(c) Definitions. As used in this section (1) "client" means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity; and includes an incapacitated person who, or whose guardian on behalf of the incapacitated person so consults the lawyer or the lawyer's representative in behalf of the incapacitated person; (2) "communication" includes advice given by the lawyer in the course of representing the client and includes disclosures of the client to a representative, associate or employee of the lawyer incidental to the professional relationship; (3) "lawyer" means a person authorized, or reasonably believed by the client to be authorized to practice law in any state or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer. (K.S.A. 60-426; L. 1965, ch. 354, § 7; Jan. 1, 1966.)

PHYSICIAN-PATIENT PRIVILEGE

60-427. Physician-patient privilege. (a) As used in this section, (1) "patient" means a person who, for the sole purpose of securing preventive, palliative, or curative treatment, or a diagnosis preliminary to such treatment, of his physical or mental condition, consults a physician, or submits to an examination by a physician; (2) "physician" means a person licensed or reasonably believed by the patient to be licensed to practice medicine or one of the healing arts as defined in K.S.A. 65-2802 in the state or jurisdiction in which the consultation or examination takes place; (3) "holder of the privilege" means the patient while alive and not under guardianship or conservatorship or the guardian or conservator of the patient, or the personal representative of a deceased patient; (4) "confidential communication between physician and patient" means such information transmitted between physician and patient, including information obtained by an examination of the patient, as is transmitted in confidence and by a means which, so far as the patient is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted.

(b) Except as provided by subsections (c), (d), (e) and (f) of this section, a person, whether or not a party, has a privilege in a civil action or in a prosecution for a misdemeanor to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that (1) the communication was a confidential communication between patient and physician, and (2) the patient or the physician reasonably believed the communication necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor, and (3) the witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or his agent or servant and (4) the claimant is the holder of the privilege or a person authorized to claim the privilege for him.

(c) There is no privilege under this section as to any relevant communication between the patient and his physician (1) upon an issue of the patient's condition in an action to commit him or otherwise place him under the control of another or others because of alleged mental incompetence, or in an action in which the patient seeks to establish his competence or in an action to recover damages on account of conduct of the patient which constitutes a criminal offense other than a misdemeanor, or (2) upon an issue as to the validity of a document as a will of the patient, or (3) upon an issue between parties claiming by testate or intestate succession from a deceased patient.

(d) There is no privilege under this section in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

(e) There is no privilege under this section as to information which the physician or the patient is required to report to a public official or as to information required to be recorded in a public office, unless the statute requiring the report or record specifically provides that the information shall not be disclosed.

(f) No person has a privilege under this section if the judge finds that sufficient evidence, aside from the communication has been introduced to warrant a finding that the services of the physician were sought or obtained to enable or aid anyone to commit or to plan to commit a crime or a tort, or to escape detection or apprehension after the commission of a crime or a tort.

(g) A privilege under this section as to a communication is terminated if the judge finds that any person while a holder of the privilege has caused the physician or any agent or servant of the physician to testify in any action to any matter of which the physician or his agent or servant gained knowledge through the communication. (L. 1963, ch. 303, 60-427; Jan. 1, 1964.)

PRIVILEGED COMMUNICATION (Psychologist)

74-5323. Privileged communication. The confidential relations and communications between a certified psychologist and his client are placed on the same basis as provided by law for those between an attorney and his client. Nothing in this act shall be construed to require such privileged communications to be disclosed. (L. 1967, ch. 432, § 23; July 1.)

INSPECTION OF PUBLIC SCHOOL RECORDS

RECORDS OPEN TO PUBLIC

K.S.A. 45-201. Official public records open to inspection; exceptions. All official public records of the state, counties, municipalities, townships, school districts, commissions, agencies and legislative bodies, which records by law are required to be kept and maintained, except those of the juvenile court which shall be open unless specifically closed by the judge or by law, adoption records, records of the birth of illegitimate children, and records specifically closed by law or by directive authorized by law, shall at all times be open for a personal inspection by any citizen, and those in charge of such records shall not refuse this privilege to any citizen. (L. 1957, ch. 455, § 1; June 29.)

The following report taken from the "Kansas Law Review" entitled COMMENTS. Inspection of Public Records, concludes with--"Vagueness has its Virtue--." Can counselors afford to be so virtuous?

INSPECTION OF PUBLIC SCHOOL RECORDS

from
Kansas Law Review
1962 Vol. 11

COMMENTS. Inspection of Public Records.

Introduction: I, for one, have the conviction that government ought to be all outside and no inside. I, for my part, believe that there ought to be no place where anything can be done that everybody does not know about....Everybody knows that corruption thrives in secret places, and avoids public places, and we believe it a fair presumption that secrecy means impropriety....Government must, if it is to be pure and correct in its process, be absolutely public in everything that affects it.--Woodrow Wilson, The New Freedom, 92-104 (1913).

It is all too frequent that accusations are leveled at government officials charging that information is being withheld from the public and that secrecy prevails in public offices. It is not the purpose of this comment to determine the veracity of these innuendoes, but to determine to what extent access to public records is allowed, and thus provide a basis for the individual who might wish "to do something about it." This prompts discussion of three basic questions: (1) Is the record "public"? (2) If "public," is it a record open to inspection? (3) If open to inspection, to whom is the right accorded and will the court enforce this right?

This inquiry is limited to states and their subsidiaries with emphasis on the Kansas position when applicable. Special attention will be given to the recently adopted Kansas statute on the inspection of public records,[1] which at this time, has not been litigated in the Supreme Court of Kansas. This comment is further restricted to "records" as distinguished from "proceedings."

IS THE RECORD PUBLIC? What are Public Records? The right of inspection is limited to public records. A public record is one required by law to be kept in discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done. What is a public record is a question of law. The elements essential to constitute a public record are namely that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it.[2] The mere fact that a record made by a public officer is on file in a public office or is in the custody of a public officer does not make it a public record.[3]

Generally, there is no single test which may be applied to determine what are and what are not public records. In some states the primary source is statutory definition; in most states the primary source is court decisions; in all states the courts are the final source either in declaring common law[4] or interpreting a statute.[5]

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1 Kan. G.S. 1961 Supp., 45-201 to 203.
2 Amos v. Gunn, 84 Fla. 285, 94 So. 615,634 (1922).
3 Miller v. Murphy, 78 Cal. App. 751,248 Pac. 934 (Dist.Ct.App.1926).
4 E.g.,In re Caswell, 18 R.I. 835,29 Atl. 259 (1893).
5 E.g., Coldwell v. Board of Pub. Works, 187 Cal. 510,202 Pac. 879 (1921).

The Louisiana Public Records Act[6] is a commendable legislative approach to the problem. It is a long and comprehensive measure stating in detail what records are public and the exceptions that are not. The recently enacted public records act of Kansas[7] does not include a definition of "record." It refers only to those records required by law to be kept and maintained, so the common law would undoubtedly have to be resorted to in most instances. A definition of records is given in KAN.G.S. 1961 Supp., 75-3501, but it applies only "for the purposes of this act." The act refers to archives and historical records, so this would be of questionable value in determining public records in general. Nevertheless, in cases involving the right of inspection of records, there is a judicial tendency to adopt the statutory definitions which are prone to be cautious and restrictive. In ruling upon an issue of the right to inspect a report concerning local *police department* conditions, a New Jersey court applied the statutory definition of public records which was embodied in a chapter concerning the *destruction of public records*.[8] However, in a Massachusetts case the definition of "public records," embodied in a similar "destruction of public records" statute, was said to be applicable only in determining what were "public records" for the purposes of this particular statute, and certain judicial records, though "public" by this statutory definition, were held to be not subject to inspection as a matter of right.[9]

IS THE PUBLIC RECORD OPEN TO INSPECTION? Right of Inspection. A brief look at the historical development of the law will aid in understanding the existing situation. In the early development of English law, association between the government and its subjects was infrequent; hence there was little opportunity for making records. As a consequence the English courts seldom were called upon to enforce the rights of individuals to inspect public records. There is authority which indicates that there was no common-law right in all persons to inspect public records.[10] There was, however, a need for the right of inspection where a record was sought in order to obtain evidence or information for use in pending or prospective litigation. The English courts recognized this need and enforced it "by mandamus proceedings instituted in his behalf by the Attorney General."[11] The rule developed that: *Every Person is entitled to the inspection either personally or by his agent, of public records, including legislative, executive, and judicial records, provided he has an interest therein which is such as would enable him to maintain or defend an action in which the document or record sought can furnish evidence or necessary information.*[12]

This rule has been interpreted as being not so much a *denial of the right* of every citizen to inspect the public records and documents as it is a *declaration of the interest* which a private individual must have to avail himself of the extraordinary writ of mandamus to *enforce* his right.[13]

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6 La. Rev. Stat. §§ 44:1-39 (1950)
7 Kan. G.S. 1961 Supp., 45-201.
8 Stack v. Borelli, 3 N.J. Super. 546,66 A. 2d 904 (L.1949).
9 Sanford v. Boston Herald-Traveler Corp., 318 Mass. 156,61 N.E. 2d 5 (1945).
10 45 AM. Jur. Records & Recording Laws § 17 (1943).
11 See Mowack v. Fuller, 243 Mich. 200, 219 N.W. 749,750 (1929).
12 45 AM. Jur., op. cit. supra note 10.
13 Nowack v. Fuller, supra note 11.

While the rule migrated to the United States, it is argued that English courts intended to state the nature of the interest required for *enforceable* inspection rather than to limit the inspection to instances of need for the purposes of litigation.[14] Indications are that the rule was not one of exclusion, but intended to be a grant of the right to *enforce* inspection in the circumstances stated. (All would still have the right of inspection, but the reason for wanting to inspect might be of such a trivial nature that equity would not grant the extraordinary writ of mandamus to *enforce* it, should a particular officer refuse to allow inspection.) Unfortunately, some early American cases seem to have adopted this rule as one of grant and exclusion and have refused inspection except when the applicant had that particular narrow interest. Such an interest is still essential in the absence of statutes which grant a broader right.

The common-law rule would be tolerable if the only use of public records was for litigation. However, today other uses are prevalent.[15] In general, states may be said to fall into one of three catagories: (1) general inspection states--there is a general right of inspection of such records as are determined to be public by statutory and judicial definition and tests; (2) specific statute states--a right of inspection of records is allowed by a number of specific statutes which specifically enumerate those records not subject to public inspection; and (3) the common-law states--determination of the right of inspection is based on the common-law theory.

A state has the power to grant by statute the right of inspection of public records to all persons, regardless of interest, and correspondingly to withhold by statute the right of inspection of such records or to surround the exercise of the right with such restrictions as it deems necessary and proper.[16] The effect of most statutes is to eliminate the requirement of some special interest in the records to entitle one to a right of inspection or to a writ of mandamus to enforce an existing right to inspect.[17] Any legitimate purpose is sufficient.[18] Some statutes have been construed to make public records subject to inspection irrespective of motive, and mere curiosity may be sufficient motive.[19] Others have been sortrued to relieve the applicant of the burden of proving a proper purpose.[20] The right to inspect is always subject to reasonable regulation, but such regulation must not be of such an arbitrary nature as to deny the applicant the right granted to him by law.[21]

Prior to 1957 Kansas apparently followed the common-law rule that anyone with a present interest in the information could examine the records,[22] but in 1957 a "Records Open to Public" Act became effective.[23] This act provides that: *All official public records*

14 Ibid.
15 See generally Note, 42 Harv. L. Rev. 133.
16 Flint v. Stone Tracy Co., 220 U.S. 107 (1911); State v. McCubrey, 84 Minn. 439, 87 N.W. 1126 (1901).
17 E.g., State v. Rachac, 37 Minn. 372, 35 N.W. 7 (1887).
18 E.G., North v. Foley, 238 App. Div. 731, 265 N.Y.S. 780 (Sup.Ct. 1933).
19 Butcher v. Civil Serv. Comm'n, 163 Pa. Super. 343, 61 A.2d 367 (1948) (dicta); contra, Brewer v. Watson, 71 Ala. 299,46 Am. Rep. 318 (1882).
20 State v. Couch, 116 Fla. 120, 156 So. 297 (1934).
21 State v. McGrath, 104 Mont. 490, 67 P. 2d. 838 (1937).
22 Boylan v. Warren, 39 Kan. 301, 18 Pac. 174 (1888).
23 Kan. G.S. 1961 Supp., 45-201 to -203.

of the state, counties, municipalities, townships, school districts, commissions, agencies and legislative bodies, which records by law are required to be kept and maintained, except those of the juvenile court which shall be open unless specifically closed by the judge or by law, adoption records, records of the birth of illegitimate children, and records specifically closed by law or by directive authorized by law, shall at all times be open for a personal inspection by any citizen, and those in charge of such records shall not refuse this privilege to any citizen.

There is a further provision which allows the records to be photographed[24] and one imposing a penalty on officials who violate the act.[25] Kansas can now be considered a general inspection state. No cases have arisen which involve this statute, so its remifications are open to conjecture.

A recent New York case[26] provides an interesting distinction. A plaintiff newspaper sought to inspect the files and records of the Triborough Bridge and Tunnel Authority, contending it had such right under the laws allowing inspection of public records. Such a contention could only be sustained if the Authority was an agent of the city or of the state. It was held that the Authority was independent from the state to the extent that it was not subject to the general laws governing the rights of the people to inspect the public records of government.

A distinction has been drawn between an independent state agency and an agent of the state. The words "agency" and "instrumentality," with respect to a state, have a distinct difference in legal connotation from the word "agent." The former contemplate an *independent* authority to which the state *delegates* governmental power for performance of a state tunction, while the latter connotes one through whom the state acts *directly* in carrying out its governmental functions.[27] It would thus appear that the records of an independent state agency (viz., Kansas Turnpike Authority) are not public records within the Public Records Acts and consequently not open to inspection by the public, while the records of an agent of the state (viz., State Highway Commission) are public records and open to public inspection under the Acts.

The right to inspect judicial records is substantially like those applicable to public records generally. Judicial records have been defined as "a memorial of a proceeding or act of a court of record entered in a roll for its preservation; a memorial or history of judicial proceedings in a case, commencing with the writ or complaint and ending with the judgment."[28] An exception to the general right of inspection of court records is that a court has the discretion to impound its files in a case and to deny public inspection of them when justice so requires.[29]

There is often confusion between the right to inspect judicial records and the right to report them with the protection of privilege in libel before they have become the subject of judicial action. The

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24 Kan. G.S. 1961 Supp., 45-202
25 Kan. G.S. 1961 Supp., 45-203
26 New York Post Corp. v. Moses, 10 N.Y.2d 199,176 N.E.2d 709(1961).
27 Ciulla v. State, 77 N.Y.S.2d 545 (Ct.Cl.1948);see also, Pantees v. Saratoga Springs Auth., 255 App. Div. 426,8 N.Y.S.2d 103 (1938).
28 21 C.J.S. Courts § 225 (1939).
29 Sanford v. Boston Herald-Traveler Corp., supra note 9.

importance of the distinction lies in the fact that in the majority of states judicial records are open to inspection by citizens when the papers become judicial records, through being filed or some other procedure. Proceedings in open court are not incident to the right of inspection, but in most jurisdictions the defense of privilege is not available in respect to articles published in the absence of or before there has been judicial action.[30] While the press in such states is not barred from printing, it will not have the defense of privilege, although it may or may not have the defense of trugh or some other defense. It follows, therefore, that if the right to inspect depends on the right to print with protection of privilege, there is no right to inspect in the great majority of states until judicial action has commenced.[31]

It might also be noted that there are statutes in some states by which records may be inspected, even though they cannot be lawfully published--the so called "you can't print that" statutes.[32]

RECORDS SUBJECT TO INSPECTION. By general rules of statute and common law, the right of inspection is applicable only to those records which are public and are not withheld from inspection by statute or common-law declarations of public policy. There are a considerable number of records subject to public inspection in the specific statute states, but relatively few are subject to such inspection in the common-law states. In accordance with a general rule of statutory interpretation, a statute providing for the inspection of certain specifically enumerated public records is construed as excluding from its effect all records not expressly mentioned. Common-law principles dealing with the public character of records are to be applied with respect to cases not included in the statute.[33]

The records subject to public inspection by an applicant, who is qualified under the controlling statute or common-law and who has a lawful or proper purpose, are those made subject to such inspection by specific statutes and those which meet statutory or common-law definitions of the term "public records." In general this includes judicial records,[34] municipal records,[35] state records,[36] and tax records.[37] Other reocrds not redily classified under any one of these heads but which have been held open to inspection include patents,[38] pollbooks and registration lists,[39] parts of the records and proceedings of an electoral board,[40] and railroad schedules filed pursuant to public law.[41]

The right of access is often extended by statute not only to public records, but also to documents which are not required by law to be filed as public records such as those which relate to

30 Barber v. St.Louis Dispatch Co., 3 Mo. App. 377 (1977).
31 See generally Thayer, Legal Control of the Press (2d ed.1944).
32 E.g., Wis. Stat. Ann. § 942.02 (1958).
33 Norwack v. Fuller, supra note 11.
34 45 AM.Jur. Records & Recording Laws § 21 (1943).
35 Id. §§ 22-23.
36 Id. § 24.
37 Id. § 25.
38 40 AM. Jur. Patents § 10 (1943).
39 Payne v. Staunton, 55 W.Va. 202, 46 S.E. 927 (1904).
40 Gleaves v. Terry, 93 Va. 491,25 S.E. 552 (1896).
41 Fagan v. State Bd. of Assessors, 80 N.J.L. 516,77 Atl.1023(1910).

matters of taxation, revenue, and proceedings for carrying out governmental projects at public expense.[42]

KAN. G.S. 1961 Supp., 45-201 provides that all official public records of the state, counties, municipalities, townships, school districts, commission, agencies, and legislative bodies which are by law required to be kept, are to be open to inspection by any person. Other Kansas statutes which make specific records open to the public include records of license plates,[43] records of birth or death,[44] and abstractors.[45]

RECORDS NOT SUBJECT TO PUBLIC INSPECTION. In general, the records in public offices which are not subject to public inspection are those which are not public in the legal sense, but are private, secret, privileged, or confidential because of their nature or because of stated considerations of public policy, and those which, through public in the legal sense, are withheld from such inspection by statute or by common-law rules.

There is no general right of inspection of records: (1) of executive departments which are not intended as notice, but are kept merely as evidence of transactions in the departments;[46] (2)of communications in writing passing between officers of the government, in the course of their official duties and relating to the business of their offices (such records are confidential and privileged from disclosure on the ground of public policy, and production will not be compelled by the courts);[47] (3) which, although of a public nature, must be kept secret and free from common inspection, such as dispatches in the detective policy service, or records otherwise relating to the apprehension and prosecution of criminals;[48] (4) which fall within the rule that it is the duty of a citizen to communicate to the executive officers of government any information which he has of the commission of any offense against the laws--such information by a private citizen being a privileged and confidential communication.[49] The question arose in the trial of Aaron Burr, wherein Chief Justice Marshall allowed issuance of a subpoena duces tecum to President Jefferson for the production of designated documents and held that the President was bound to appear, but that he should be allowed to hold back any document, or part of a document, which he thought ought not to be produced.[50] The rule is well settled,[51] but not limited to federal government, as confidential status has been accorded communications to executive officers of state government,[52] and by way of inference to officers of municipal government.[53] Where a communication was sent in pursuance of an unlawful conspiracy to injure the person

42 Runyon v. Board of Prison Terms & Paroles,26 Cal.App.2d 183,79 P.2d 101 (Dist.Ct.App. 1938) (dicta).
43 Kan. G.S. 1949, 8-148.
44 Kan. G.S. 1949, 65-144.
45 Kan. G.S. 1949, 67-804.
46 McGarrahan v. New Idria Mining Co., 96 U.S. 316 (1877); Lefebvre v. Somersworth Shoe Co.,93N.H.354,41 A.2d 924 (1945).
47 Gardner v. Anderson, Fed. Cas. No. 5220 (C.C.Md. 1876).
48 45 AM. Jur. Records & Recording Laws § 26 (1943).
49 Vogel v. Gruaz, 110 U.S. 311 *1884); United States v. Keown, 19 F. Supp. 639 (W.D. Ky. 1937).
50 1 Trial of Aaron Burr for Treason (1897).
51 Egan v. Board of Water Supply, 205 N.Y. 147,98 N.E. 467 (1912).
52 Michael v. Matson, 81 Kan. 360,105 Pac. 537 (1909).
53 Egan v. Board of Water Supply, supra note 51.

informed about, privilege status has been denied;[54] (5) on file in public institutions such as hospitals, concerning the condition, care, and treatment of patients or inmates,[55] and (6) where such inspection or use of contents would be detrimental to the public interest.[56] Illustrative of mandatory secrecy by statute are fire prevention records,[57] adoption proceedings,[58] records of juvenile court and records of birth of illegitimate children.[59]

MANDAMUS. Without a means to enforce it, the right to inspect public records would be of little consequence. Mandamus is the proper remedy to enforce the right to inspect public records subject to reasonable regulations where the applicant shows the requisite interest.[60] However, "it is elementary that the court is not bound to allow the writ merely because the applicant shows a clear legal right for which mandamus would be an appropriate remedy, even though without mandamus the applicant for the writ would be without remedy. Even under these circumstances the court may deny the writ where by its issuance the public would be injuriously affected...."[61]

In a Kansas case involving inspection of the judgment docket and mechanics lien book, the court held that any person who has a present and existing interest in information to be obtained from the public records in any county office has a right to make an examination of such records to the extent of his interest, and may enforce such right by mandamus.[62] In another Kansas case the court held that mandamus would not lie to compel the register of deeds to permit the relator to make copies of the entire records of his office for the purpose of making a set of abstract books.[63]

The right of a private citizen to inspect public records is theoretically absolute, but mandamus will not be granted to enforce such right if petitioner's purpose in desiring to see the records is merely to satisfy idle curiosity.[64] Mandamus is granted only in the sound discretion of the court where it is satisfied that the writ will serve some just or useful purpose; however, the court may not be arbitrary in its discretion.[65] There is much truth in the statement that "the right is, in theory, absolute, yet it is in practice so limited by the remedy necessary for its enforcement that it can be denominated only a 'qualified right.'"[66]

There are further limitations on inspection, although ordinarily of little significance. An officer having the custody of public records is entitled to exercise a reasonable discretion in

54 State v. Wilcox, 90 Kan. 80,132 Pac. 982 (1913).
55 Massachusetts Mut. Life Ins. Co. v. Michigan Asylum, 178 Mich. 193,144 N.W.538 (1913);Smart v.Kansas City,208 Mo.162,105 S.W. 709 (1907).
56 State v.Miller,204 Ala.234,85 So.700 (1920)(jury rolls);In re Caswell,18 R.I.835,29 Atl.259 (1893) (divorce records).
57 KAN. G.S.1949, 31-201.
58 KAN. G.S. 1949, 59-2279.
59 KAN. G.S. 1961 Supp., 45-201.
60 Ex parte Uppercu, 239 U.S. 435 (1915); Boylan v.Warren,supra note 22.
61 38 C.J.Mandamus § 18 (1933).
62 Boylan v. Warren, supra note 22.
63 Cormack v. Wolcott, 37 Kan.391,15 Pac. 245 (1887).
64 Pressman v. Elgin, 187 Md. 446,50 A.2d 560 (1947) (dicta).
65 Ibid.
66 Annot., 102 A.L.R. 756 (1936).

making regulations in regard to the inspection and use thereof, such as a restriction on the hours during which the inspection may be made,[67] or rules which are proper for the purpose of securing the safety of such records.[68] It is also a reasonable regulation to require persons using records for the purpose of making abstracts therefrom to pay a fee for providing additional office facilities,[69] or to require an attorney desiring to inspect records in the interest of a client to produce satisfactory evidence of his authority.[70] Also, such officer may exclude from his office persons who conduct themselves in an improper or disorderly manner.

CONCLUSION

Not much can be said by way of conclusion that has not already been said. No effort is here made to predict the ultimate judicial construction of the Kansas statute. A definition of what constitutes a "public record" might be considered, but vagueness has its virtue in that it allows interpretation in harmony with the conditions prevailing at a given time. A democracy cannot function without public knowledge of the realities of government activities, and the public records acts do much to insure an informed citizenry.

--William P. Haas

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67 Upton v. Catlin, 17 Colo. 546,31 Pac. 172 (1892).
68 State v. Rachac, 37 Minn. 372,35 N.W. 7 (1887).
69 Burton v. Raynolds, 102 Mich. 55,60 N.W. 452 (1894).
70 Brewer v. Watson, 71 Ala. 299, 46 Am.Rep. 318 (1882).
71 People v. Reilly, 38 Hun. 429 (N.Y. Sup.Ct. 1886).